No. 448

In the Supreme Court of the United States

OCTOBER TERM, 1944

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

HANCOCK TRUCK LINES, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION IN OPPOSITION TO APPELLEE'S STATEMENT AGAINST JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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STATEMENT

This brief is filed by appellants under Rule 12, paragraph 3 and Rule 7, paragraph 3 of the rules of this Court, in opposition to appellee's statement against jurisdiction and motion to dismiss or affirm, which was served upon appellants on August 3, 1944.

As set out in appellants' jurisdictional statement, the final decree setting aside an order of the Interstate Commerce Commission here sought

to be reviewed, was entered by a three-judge court on May 25, 1944. The appeal was granted on July 22, 1944, by a single judge, who was a member of the three-judge court. This date was more than 30 days after the date of the final decree, but within 60 days of that date. Appellee objects to the jurisdiction of this Court on two grounds: (1) That the appeal was not timely because not taken within 30 days of the entry of the final decree; and (2) that the appeal was improperly granted because it was allowed, not by a majority of the statutory three-judge court which had entered the final decree, but rather by a single district judge who had sat as a member of that court.

It is submitted that both these contentions are without merit.

ARGUMENT

1. The pertinent statutory provisions relating to appeals to this Court from decrees of three-judge district courts setting aside orders of the Interstate Commerce Commission are 28 U. S. C. 47 and 47a. The former Section provides in part:

> An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, [setting aside an order of the Commission] in such case if such appeal be taken within thirty days after the order, in respect to

> which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply.

The latter Section provides in part:

> A final judgment or decree of the district court in the cases specified in section 44 [1] of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree * * *.

Since the present case involves an appeal from a final judgment, rather than an interlocutory judgment, Section 47a, on its face, appears to be applicable, and an appeal within the 60 days prescribed by that Section appears to be timely. Appellee urges however, that Section 47a was in fact repealed by the Act of February 13, 1925 (43 Stat. 936, 938, 940) and that the compilers of the code have improperly included its provisions in the code. Thus, it says, the only applicable provision is Section 47. Since the last sentence of that Section makes the procedure applicable

[1] Section 44 prescribes the procedure in the district courts (28 U. S. C. 44):

"(b) in respect to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission * * *."

to appeals from interlocutory injunctions also applicable to final hearings, appellee asserts that the 30-day appeal time set forth in that Section for appeals from interlocutory injunctions must also be considered as applicable to appeals from final decrees.

Both the legislative history of these provisions and the consistent practice of this Court are to the contrary.

The original Commerce Court Act of June 18, 1910 (36 Stat. 539) gave to the Commerce Court jurisdiction over four types of cases: (1) Suits to enforce orders of the Interstate Commerce Commission, (2) suits to enjoin orders of the Commission, (3) certain suits to prevent unjust discriminations, and (4) certain mandamus proceedings. Section 2 of that Act (36 Stat. 542) provided that "a final judgment or decree of the commerce court may be reviewed by the Supreme Court of the United States if appeal * * * be taken * * * within sixty days after the entry of said final judgment or decree." The same Section provided that an appeal might be taken to the Supreme Court within 30 days from the entry of an interlocutory order of the Commerce Court granting or continuing an injunction restraining an order of the Commission.

The Commerce Court was abolished by the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 219–221), and by that Act all its jurisdic-

tion was transferred to the several district courts. With respect to one of the four types of cases falling within the Commerce Court's jurisdiction, namely, suits to enjoin orders of the Commission, it was provided that both the interlocutory and the final hearing should be before three judges. This Act further provided for a direct appeal to the Supreme Court from an order granting or denying an interlocutory injuction against a Commission order, provided such appeal was taken within 30 days.[2] This language is the basis for 28 U. S. C. 47. The next sentence in the Urgent Deficiencies Act (38 Stat. 220), the basis for 28 U. S. C. 47a, reads as follows:

> A final judgment or decree of the district court may be reviewed by the Supreme Court * * * if appeal * * * be taken * * * within sixty days after the entry of such final judgment or decree * * *.

Appellee contends that this last sentence does not refer to appeals from final judgments in cases involving suits to set aside orders of the Com-

[2] This portion of the statute reads (38 Stat. 220):

"An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying * * * an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, * * * and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply."

mission which, under the Urgent Deficiencies Act must be heard by a three-judge court. It argues that instead this language refers only to appeals in the other types of cases within the jurisdiction of the Commerce Court, which, under the Urgent Deficiencies Act, were transferred to the district courts, and were to be heard by a single district judge. It is apparently on this assumption that appellee bases its contention that the sentence last quoted was repealed by the Act of February 13, 1925 (43 Stat. 936), the pertinent portion of which provides (43 Stat. 936, 938, 941, 942):

> Sec. 1. * * * A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise: * * *
>
> (4) So much of "An Act making appropriations to supply urgent deficiencies in appropriations for the fiscal year 1913, and for other purposes," approved October 22, 1913, as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money. * * *
>
> SEC. 13. That the following statutes and parts of statutes be, and they are, repealed: * * * All other Acts and parts of Acts

> in so far as they are embraced within and superseded by this Act or are inconsistent therewith.

The contention is that since the language of the Urgent Deficiencies Act now found in 28 U. S. C. 47a did not relate to appeals from judgments in cases involving suits to enforce or suspend orders of the Commission, and since all the provisions of that Act except those relating to appeals in such cases were repealed by the 1925 Act, the language of 28 U. S. C. 47a must be considered repealed by that Act.

The fallacy in this argument is the basic assumption that the language of 28 U. S. C. 47a, as found in the Urgent Deficiencies Act, related only to appeals from one-judge court final judgments in cases not involving suits to enforce or set aside orders of the Commission, and did not embrace also appeals from three-judge court final judgments in suits to set aside Commission orders. It is obvious, we submit, that this language referred to appeals from both types of cases. In the first place, the unrestricted wording of this language is entirely inconsistent with the restricted construction which appellee would place upon it. Furthermore, it is to be noted that this language follows immediately, and in the same paragraph, the provision, now found in 28 U. S. C. 47, relating to appeals from interlocutory injunctions restraining or-

ders of the Commission (see footnote 2, *supra*, p. 5). Certainly Congress intended the two sentences to be read together, and in prescribing the appeal time from final decrees, it must have had in mind particularly appeals from final decrees in the type of case about which it had been speaking in the preceding sentence, that is, in suits to restrain orders of the Commission. Since this language of the Urgent Deficiencies Act thus does relate to appeals from final decrees in cases seeking to set aside orders of the Commission, and since the Act of February 13, 1925, reaffirms so much of the Urgent Deficiencies Act as relates to the review of both interlocutory or final decrees in suits to set aside orders of the Commission, it is evident that the latter Act reaffirms, rather than repeals, this language of 28 U. S. C. 47a. Consequently, the compilers of the code properly included this provision in the 1934 edition of the code to correct their error in deleting it in earlier editions. And if 28 U. S. C. 47a be deemed not repealed, its specific provision regarding the time for appeal from a final decree must be considered to control, so far as appeal time is concerned, the more general provision now found in 28 U. S. C. 47, that "upon the final hearing * * * the same procedure [as in interlocutory hearings] as to expedition and appeal shall apply."

If appellee's contentions are correct, a very large proportion of appeals in suits to set aside

orders of the Commission have been improperly granted and numerous decisions of this Court have been made in appeals over which this Court had no jurisdiction. A review of the briefs in the Commission's cases before this Court in the past two Terms alone indicates that in the following cases appeals were taken more than 30 days, but within 60 days, after the final decree: *L. T. Barringer & Co.* v. *United States*, 319 U. S. 1; *Interstate Commerce Commission* v. *Columbus & Greenville Ry. Co.*, 319 U. S. 551; *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671; *Interstate Commerce Commission* v. *Hoboken R. Co.*, 320 U. S. 368; *Crescent Express Lines* v. *United States*, 320 U. S. 401; *McLean Trucking Co.* v. *United States*, 321 U. S. 67; *Eastern-Central Motor Carriers Ass'n* v. *United States*, 321 U. S. 194; *United States* v. *Wabash R. Co.*, 321 U. S. 403; *Chicago, St. P., M. & O. Ry. Co.* v. *United States*, 322 U. S. 1; *United States* v. *Marshall Transport Co.*, 322 U. S. 31. In *Interstate Commerce Commission* v. *Columbus & Greenville Ry. Co.*, *supra*, the appellee made the same contention as is made in the case at bar in support of a motion to dismiss the Commission's appeal or affirm. While no specific action was taken on the motion, the Court proceeded to decide the case on the merits and thus impliedly rejected the contention.

Appellee refers to the statement made by this Court in *Virginian Ry.* v. *United States,* 272 U. S. 658, 672, that the Urgent Deficiencies Act had shortened the appeal time. It asserts that the Court meant that the Urgent Deficiencies Act had reduced the appeal time from 60 days to 30 days. It appears, however, that all that the Court meant was that the Urgent Deficiencies Act had established a shorter period for taking an appeal to this Court than the three-month period which is the general appeal time (see 28 U. S. C. 350). And the motion to set aside the judgment, filed in the instant case by a private defendant (the Regular Common Carrier Conference of the American Trucking Associations, Inc.), which indicates that this defendant thought the appeal time had expired at the end of 30 days, is of no significance. This admission is not, of course, binding on these appellants, and, in any event, the jurisdiction of this Court cannot be expanded or contracted by admissions of the parties.

2. The second ground for appellee's motion is that the appeal was improperly taken because the order allowing the appeal and the other appeal papers were signed only by the district judge in whose court the suit was filed rather than by the three judges who composed the statutory court which had rendered the final decree. This contention is equally without merit.

In 28 U. S. C. 47 and 47a, as above indicated, the trial and appellate procedure in suits seeking to set aside orders of the Commission is prescribed in detail. It is significant that while Section 47 requires the assembly of three judges to hear and determine an application for an interlocutory injunction in such a case,[3] and further provides that "upon the final hearing * * * the same requirement as to judges * * * shall apply," there is no longuage in either Section requiring three judges for the granting of an appeal to the Supreme Court. Unquestionably the failure of Congress to provide specifically for the assembly of three judges to allow an appeal was not inadvertent. The granting of an appeal, when, as here, it is a matter of right, is a purely ministerial act. Such an act is entirely unlike the hearing and determining of the case either at the interlocutory or the final stage, where the questions involved are so important from the standpoint of the public interest as to make the judgment of

[3] The pertinent portion of Section 47 provides:

"No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. * * *"

more than one judge desirable. Accordingly, there is no need to assemble three judges merely to sign their names to an appeal order. And in many cases an appeal might be jeopardized merely because of the inability of an appellant to assemble three judges within the time allowed for taking an appeal.

Again, it has been the consistent and usual practice in taking appeals to this Court in this type of case to have the appeal allowed by a single judge. In *Tagg Bros.* v. *United States*, 280 U. S. 420, 433, the opinion recites that "the District Judge allowed an appeal to this Court." Footnote 2 on the same page states:

> In doing so, he also approved an appeal bond to operate as a supersedeas and granted a temporary injunction pending the appeal. This part of the order, being beyond the power of a single judge, was later vacated by him. * * *

It seems apparent that this Court thought that the single judge's action, insofar as it involved the granting of the appeal, was perfectly proper. Furthermore, an examination of the printed records in some of the Commission's cases which have come before this Court in the past two Terms reveals that the appeals in the following cases were allowed by but one judge: *Interstate Commerce Commission* v. *Inland Waterways*, 319 U. S. 671; *Interstate Commerce Commission* v. *Hoboken*

R. Co., 320 U. S. 368; *City of Yonkers* v. *United States*, 320 U. S. 685; *Thomson* v. *United States*, 321 U. S. 19; *McLean Trucking Co.* v. *United States*, 321 U. S. 67; *United States* v. *Wabash R. Co.*, 321 U. S. 403; *Cornell Steamboat Co.* v. *United States*, 321 U. S. 634; *Chicago, St. P., M. & O. Ry. Co.* v. *United States*, 322 U. S. 1; *United States* v. *Marshall Transport Co.*, 322 U. S. 31; *Interstate Commerce Commission* v. *Jersey City*, No. 767, October Term, 1943, decided May 29, 1944. This practice was authorized under Rule 36 of the rules of this Court, which provides that, "In cases where an appeal may be had from a district court to this court the same may be allowed, in term time or in vacation, by any judge of the district court, including a circuit judge assigned thereto, or by a justice of this court."

Finally, any doubt that may have existed on this score was effectually removed by Section 3 of the Act of April 6, 1942, 56 Stat. 198–199, 28 U. S. C. Supp. III, 792. This Section[4] provides that in a case of this type a single judge may "enter all orders required or permitted by the

[4] Section 3 provides (28 U. S. C. Supp. III, 792):

"In any action in a district court wherein the action of three judges is required for the hearing and determination of an application for interlocutory injunction and for the final hearing by reason of the provisions of section 266 of the Judicial Code, the Act of October 22, 1913, chapter 32, or the Act of August 24, 1937, chapter 754, section 3 (being, respectively, secs. 380, 47, and 380a of title 28, U. S. C.), or the

Rules of Civil Procedure for the District Courts of the United States in effect at the time, provided such single judge shall not appoint, or order a reference to a master, or hear and determine any application for, or vacation of, an interlocutory injunction, or dismiss the action, or enter a summary or final judgment on all or any part of the action * * *." Under the Rules of Civil Procedure, a single judge is permitted to grant an appeal to the Supreme Court. Thus, Rule 72 provides that an appeal from a district court to the Supreme Court shall be allowed "as prescribed by law and the Rules of the Supreme Court of the United States governing such an appeal," and, as above indicated, Rule 36 of the rules of this Court authorizes the granting of an appeal to this Court from a district court by a single judge.

Act of February 11, 1903 (32 Stat. 823; U. S. C., 1940 edition, title 15, sec. 28 and title 49, sec. 44), as amended by section 1 of this Act, any one of such three judges may perform all functions, conduct all proceedings, except the trial of such action, and enter all orders required or permitted by the Rules of Civil Procedure for the District Courts of the United States in effect at the time, provided such single judge shall not appoint, or order a reference to a master, or hear and determine any application for, or vacation of, an interlocutory injunction, or dismiss the action, or enter a summary or final judgment on all or any part of the action: *Provided, however,* That any action of a single judge hereby permitted shall be subject to review at any time prior to final hearing by the court as constituted for final hearing, on application of any party or by order of such court on its own motion."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the motion should be denied and the Court's jurisdiction sustained.

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